IN THE

Supreme Court of the United States

October Term, 1957

No. 133

PARRIS SINKLER

v.

MISSOURI PACIFIC RAILROAD COMPANY

RESPONDENT'S MOTION FOR REHEARING

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I.

The Supreme Court of the United States erred in its majority opinion, holding that the conduct of operational activities dealing with cars of the Respondent Missouri Pacific Railroad Company, a Missouri corporation, by a separate Texas corporation through its own separate employees and with its own separate equipment constituted such Texas Corporation and/or its employees so engaged, "officers, agents or employees" of the carrier for whom the plaintiff worked, within the meaning of the Federal Employers Liability Act.

Argument

When this Honorable Court has finished the reading of this, the Respondent's Motion for Rehearing, we sincerely hope that the Court will have sensed Respondent's deep concern over the problem that will confront not only the Respondent but American Railroads generally if the Court's majority opinion should become final. A real problem will result in all large industrial shipping centers where Railroad Terminal Companies have become a necessary, and a vital part of the railroad industry.

The payment of the monetary judgment by Respondent to the Petitioner would be comparatively inconsequential. The tremendously important and dangerous aspect of the decision, if permitted to stand, is that it needlessly shakes the very foundation of the Terminal Companies.

The Petitioner in this case had a perfect legal remedy against the Houston Belt and Terminal Railroad Company. Had he so filed his suit he couldn't have failed to recover because as to liability of the Belt, he had *a res ipsa loquitur* case. Through neglect, carelessness, or unconcern, he failed to file his suit against the Belt within the two year period allotted by the law. Just nine days short of three years after the accident, and after he had lost his right to sue the Belt, an attorney whom he consulted advised him that he "had waited so long that his only chance was to sue his own company and see what would happen!" (R. P. 35). This statement of Petitioner from the witness stand reflected clearly his attorney's dim view of his right of recovery against the Respondent. He knew that their only chance was to picture the Houston Belt and Terminal Railroad Company as a mere

"stooge", a subservient agent of the Respondent, subject to its entire control and manipulation and performing a non-delegable duty. This conclusion is clearly evidenced by the adroitly and prejudicially worded statement with which Petitioner's application for certiorari is concluded, to-wit:

> "the ultimate fact that Belt is nothing more than an instrumentality of Respondent and the other stockholding lines, created to perform switching, and terminal operations for them at Houston, and wholly incapable of any independent existence, all furnish ample support for the Jury's verdict. To allow the Judgment of the Court of Civil Appeals to stand is to deprive petitioner of his right to a jury trial" - Page 12 - Petition for Writ of Certiorari.

The Court of Civil Appeals for the Ninth Supreme Judicial District of Texas took cognizance of Petitioner's analysis of the evidence in that regard and properly evaluated it in that Court's written opinion (R. P. 107.) We will not repeat that evaluation here, but suffice it to say that the Court's opinion in that regard is in line with the great weight of authority, (see cases cited in the Court's opinion).

As against the Petitioner's Prejudicial appraisal of the Belt, which by the way, has now been repudiated by fourteen appellate Judges, (two members of this Honorable Court, two members of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, and nine members of the Supreme Court of Texas), Respondent will now pose the real facts as disclosed by the record together with facts of which this Court can take Judicial knowledge.

The Houston Belt and Terminal Railroad Company is a legal entity, a duly incorporated Railroad Company, with charter powers, and franchise obligations, in just as true and as strict a sense as the Missouri Pacific Railroad Company has charter powers and franchise obligations.

The Sovereign State of Texas, under the authority of Art. 6549, and Sec. 72 of Art. 1302 of its Civil Statutes issued to the Houston Belt & Terminal Railroad Company, its charter, giving it full right and authority to own and operate terminal facilities, including the Union Railroad Passenger Station in Houston, the railroad yard and the main line and switch tracks that lead to such Union Station. The State of Texas issued such charter because it recognized, (1) That the general Public was entitled to a safe, an economical, and a business like handling of Railroad traffic entering the City of Houston. (2) That it would be imprudent, unsafe, unbusiness like, and thoroughly impractical to force the various Railway Lines which serve the City of Houston to locate (if possible) and purchase separate yards, and build and maintain separate Passenger Stations, with a net work of railroad tracks which would have to cross and recross the other similar net works of tracks of each of the other Railroad Companies that serve the City of Houston. (3) That it was not only sound Railroading Practice, but also good business to permit one Railroad Company (preferably not one engaged in inter-city transportation) to own and operate one terminal passenger station, one set of terminal tracks, one managerial set up, one traffic dispatching system, to prevent congestion of train movements, and the bottlenecking of cars. (4) That the margin of safety to both the general public and the employees

of the several railroad companies serving the City of Houston increases as the number of separate companies participating in terminal operations decreases.

These dominant factors have been known to the various railroad systems over the Country at large for long over a half century, and the Legislative bodies of the various States, charged with the enactment of appropriate laws to accommodate the needs of the larger populated areas, have kept pace with the growing needs of the industrial centers of the Nations. Thus for more than a half hundred years, it has been the considered opinion of the Legislative bodies of the several states, that embrace the larger industrial and transportation centers of the country, that separate and independent terminal railroad companies should be chartered and franchised to minimize the complexity of converging railway traffic, in the large cities, thus preventing troublesome and delaying bottlenecks in the movements of trains and cars, to save the shipping public the exorbitant cost of over lapping trackage and terminal facilities, as well as the cost incident to long delays in delivery of the commodities shipped, and to lessen the danger of injury to railway employees that is always incident to complexity of movement and congestion of traffic. Both the United States Government, through the Interstate Commerce Commission, and the State Governments, through their respective Railroad Commission, have set up the necessary rules and regulations for the establishment of the proper contract relations between the overland carrier and the terminal company.

The Interstate Commerce Commission of the Federal Government and the Railroad Commissions of the sev-

eral states, are, as governmental agencies, well fixed in the public mind. The Terminal Railroad Company as distinguished from the overland carrier has long been publicly known and recognized as a vital part of the Railroad Industry. In Houston, the Houston Belt & Terminal Railroad Company is no doubt as much in the public mind and the public press as any other Railroad Company. It is safe to say that every railroad man who rides a train into Houston is as aware of the activities and functions of Houston Belt & Terminal Railroad Company, as he is of his own company, and not one of them would ever dream or imagine that it was merely an "agent" of the company for which he worked. Rather they know it as a strong well organized Railroad Corporation itself, rendering services to all railroad companies having need of such services.

The Petitioner in this case, within thirty minutes after the happening of the accident which was made the basis of this suit, filled out an accident report. When he came to the question "to whose fault do you attribute the accident?", he answered promptly, just as any other railroad employee in Houston would have done, *"The Houston Belt and Terminal"*. Likewise, any lawyer in Houston, cognizant of the facts would have made the same answer, but not one of them, (and we include counsel for Petitioner) had he been employed by Petitioner at that time, to enforce his rights, would have conjured up the idea that he had a cause of action against his own employer, the Missouri Pacific Railroad Company.

The Petitioner himself knew, as, every lawyer in Houston would have known, that the fault lay with the Houston Belt & Terminal Railroad Company, and that his

proper and lawful course would be to prosecute his suit against that Railroad Company. It is certain that no lawyer (including the attorneys who nearly three years later, filed this suit) would have advised him that he had a cause of action against his own employer. And it can be likewise correctly asserted that every court in Texas, had the opportunity been presented, would have held that his cause of action lay against the Houston Belt & Terminal Railroad Company, and not against his Employer Company. Both the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, and the Supreme Court of Texas, to whom the question was presented, so held.

Seven members of this Honorable Court have held to the contrary, Mr. Justice Harlan and Mr. Justice Frankfurter, dissenting.

It is certain that every railroad lawyer in the whole United States will feel that the majority view of the Court is wrong. It is highly probable that ninety-five percent of the lawyers generally will agree with the Dissent.

The reason is simple.

The Federal Employee's Liability Act was enacted fifty years ago, when the Railroad Company had a monopoly on the transportation of passengers and freight. Railroad business was a thriving enterprise, and the Nation's top industry. That is not true today. Other giants of industry have grown and are growing, including other and ever expanding modes of transportation. The Railroads have already seen their greatest day. If there were no Federal Employee's Liability Act today, no one would ever think of having one enacted. The one that exists needs no judicial expansion. The public mind has taken cog-

nizance of the plight of the railroads, and the trend is not to slap them in the face but to lend a helping hand.

It is not the time to weaken the economy of the railroads by jeopardizing the existence of the Terminal Companies, which are bulwarks of railroading economy. The justification for the Terminal Company is that it enables one specialized company to own its terminal system, (station yard, switching, and interchange tracks) and to expertly operate said terminal system for several companies, and to make it available to all companies within its territorial jurisdiction.

There is no law in Texas, nor is there any legal concept, that prohibits one Railroad Company from leasing its facilities to another, so as to permit a joint use of such facility by the owner thereof, and by one or more lessee companies. Such transactions are permitted by law. For more than a half a century, as we have herein before pointed out, both our Federal agencies, and corresponding agencies of the several state governments have been recognizing Terminal Companies and dealing with them for what they are, separate, independent legal entities, incorporated Railroad Companies, with definite chartered powers, with full power to engage in the "total enterprise" of operating a terminal company.

It is possible that the delineation of the facts of this case by both the Petitioner and the Respondent in their briefs, heretofore filed, was in such general terms that it was difficult for the Court to "see the forest because of the trees". This thought is prompted by the notes following the end of the Court's opinion showing the basis of concurrence therein by Mr. Justice Clark and Mr. Justice Whittaker.

The following brief statement of the specific facts of this case, as distinguished from the general statements contained in instruments heretofore filed by the parties, ought to clear up any probable misconceptions of the factual basis of this case:

The Petitioner was a cook of the General Manager's special car. When the special car was not in use, it was stored or parked near the Belt's Union Station, on the track adjacent to Texas Avenue which marked the South limit of the Belt's Union Station and tracks. A high iron fence separate this storage or parking track from Texas Avenue. It is not unusual for this special car to remain "parked" on this storage track for a week or two at a time. On the date of the accident, the General Manager had been out on inspection tour. As usual his special car was at the end of the train. Upon arrival of the train in the yard it was backed, as usual, into the station, which made the special car, the first car into the station. After all passengers had disembarked, the train was cut loose from the special car, and it was left standing alone, near the entrance gates to the station. The General Manager and his guests left the car. The Petitioner helped in unloading the General Manager's baggage and that of the General Manager's wife who was a guest on the car. The Petitioner went to the garage at a hotel across the street from the Station, got the General Manager's automobile and drove it back in front of the station, and picked up the General Manager's wife and her baggage, and then acting as her chauffeur, drove her some eight miles or more to her home. The General Manager's train trip was over. He was through with the Special Car until the next unscheduled trip, which might be as long as ten days or two weeks later.

After the Petitioner had returned from the automobile trip to the General Manager's home, he returned to the Station, reboarded the Special Car, which was still standing where it had been originally left after being backed into the Station. The Petitioner still had a few chores to finish, such as cleaning up his pots and pans in the kitchen, and putting away the linen. It was while he was thus engaged, that the Belt's switching crew came backing in with two or three cars preparatory to coupling onto the Special Car and moving it over to its regular parking berth on the track next to the fence by Texas Avenue, and near the Station, where, by contract, or lease agreement it would remain until "the next trip" (R. 27-28, 32). The engineer of the switching crew missed a signal and the sudden jar resulted which caused the injury to the Petitioner.

The majority opinion of this court refers to the "total enterprise" of the Petitioner. The particular "total enterprise" in which the Respondent was engaged that day had been completed for more than two hours. Respondent had no more duty to perform with the Special Car. Under the law it had a perfect right to contract with the Belt for the storage of the car for the ten days or two weeks until it was needed again. Where the Belt chose to park the car, was the Belt's business. It could leave the car where it was or move it over to a spot fifty or a hundred feet away. The Respondent owed no further duty to anybody, the general public or the Petitioner with reference to the car. The parking and the storage of the car was a part of the "total enterprise" of the Houston Belt & Terminal Railroad Company.

We have made this detailed statement of the particular act which the Belt was performing at the time of the accident. Certainly the "storage" of the General Manager's private car, and the parking of it near the station on the "out of the way" track next to Texas Avenue, could not, under any theory, be considered the performance of a *non-delegable duty*. The General Shipping Public could in no wise be involved in such isolated movement.

With reference to the indicated basis of Justice Whittaker's concurrence in the majority opinion of the Court, we call to the Court's attention, the fact that the sole question involved in this case is whether Petitioner should have pursued his common law right of bringing his suit against the Belt, which he could have done in any capacity which would have been compatible with his presence in the Special Car, whether it had been as a passenger, an employee of Respondent or a mere licensee of Respondent, or whether he could bring the suit, as respondent's employee, under the "chance" theory that the Houston Belt & Terminal Railroad Company was one of the "Officers, Agents or Employees" of his own company. A relationship of *Employee* and *Employer* must exist before the Federal Employer's Liability Act can be called into play. The Act is not available to one suing as a passenger.

Having reviewed the facts of this case so as to bring into direct and clearer focus the particular act and performance of the Houston Belt & Terminal Company that is made the basis of this suit, we respectfully request this Honorable Court to further consider the F.E.L.A. as to whether it relates to that act and performance, as distin-

guished from the other larger area of switching activities, such as "the breaking up, and assembly of trains, and the handling of cars in interchange with other carriers." (Page 2 of the "Court's Opinion".)

It would seem most compatible with sound reasoning to test the limits of the F.E.L.A. to see whether its intents and purposes are sufficiently broad to encompass the Houston Belt & Terminal Railroad Company as the "owner of a parking lot," and as an *agent* of the owner who brings his car to the lot for parking. When the owner of an automobile drives his car into a parking lot or garage, and leaves it, he certainly does not thereby constitute the parking lot or garage owner (or attendant) his agent, so as to become liable for the negligent handling of the car in the lot after he (the owner) leaves it.

It is Respondent's position that by the same token, when the Respondent brought its *special car* into the Belt's *parking lot* on the occasion in question, - "got out of it," and left it, to be parked and stored for a week or ten days, Respondent did not by *that particular act* constitute the Belt its agent, so as to become liable for any negligent act which the Belt might commit while parking the car.

This case is just as simple as that. The Respondent could contract with the Belt for this one particular service, the storage and parking of its special car without the approval of any governmental agency. The general public is not involved, the shipping public is not involved. There is no theory under which the Belt, in accepting said car for storage and in parking it in a suitable spot of its own choosing, could be classed as an agent of the Respondent, under the general law. Nor is there any rhyme

or reason to seek to bring into this case the whole range and general area of activities which the Belt performs for the Respondent and other companies. It is apparent that by doing so, this Honorable Court has lost sight of the particular act out of which this case grew. Simple justice demands that Respondent be judged by that particular act, in the light of the law applicable to that particular act. The Petitioner had his right for a day in court and a jury trial under that particular act.

Petitioner respectfully requests this Honorable Court to carefully consider all that is involved in the inescapable truth contained in a statement in Mr. Justice Harlan's dissenting opinion, in which Mr. Justice Frankfurter concurred, to-wit: "This case is a further step in a course of decisions through which the Court has been rapidly converting the Federal Employer's Liability Act, 35 *Stat.* 65, as amended, 45 *U. S. C.*, Pages 51-60 (and the Jones Act, which incorporates the F.E.L.A., 41 *Stat.* 1007, 46 *U.S.C.*, Page 686) into what amounts to a workmen's compensation statute." One of the distressing features of this solemn truth is that all workmen compensation statutes contain reasonable restrictions as to the amounts of recovery, whereas the judicial conversion of the F.E.L.A. leaves the defendant railroad company exposed to the fantastic whims of the average juror who sits in damage suit cases.

The Respondent respectfully submits that the simple facts of this case have been picked up, and mingled in and with an intricate maze of activities that embrace the whole field of terminal railroad business. By so doing the Respondent's rights have been judged in the light of its general relationship with the terminal carrier in that larger

field of activities. Whereas simple justice demands that respondents be judged on the basis of the single transaction that took place on the occasion in question, the storing of respondent's special private car.

The general shipping public is not involved. *Franchise, Powers,* and *non delegable duties* are not involved.

Conclusion

The F. E. L. A. is not involved in a case wherein the Missouri Pacific Railroad Company, a Missouri corporation, backs one of its special private cars into the station owned and operated by the Houston Belt and Terminal Railroad Company, a Texas corporation, and leaves it in the same spot where it was originally placed by Respondent's own crew. By arranging with the Houston Belt and Terminal Railroad Company, to park and store the car for it, the Respondent did not become liable for the negligent act of the Belt in *parking said car* in the spot where it was to be stored,

No question has been raised in any of the courts where this case has been pending regarding the fact that it is controlled entirely by the provisions of the Federal Employers Liability Act. Hence it is obvious that no recovery can or should be had except under the provisions of that Act and within the limitations of that Act.

The opening paragraph of the majority opinion of this Honorable Court, referring to the petitioner says:

> "He recovered a judgment against the respondent in an action brought under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C., Secs.

> 51-60, in the District Court of Harris County, Texas. The Court of Civil Appeals for the Ninth Supreme Judicial District of Texas reversed upon the ground that the FELA did not subject the respondent to liability for injuries of its employee caused by the fault of employees of the Belt Railway. 295 S.W. 2d 508."

The Texas Court of Civil Appeals in the opinion just cited, after stating the nature of the accident in which plaintiff was injured, in its opening paragraph said:

> "The plaintiff subsequently brought this action against the trustee under the Federal Employers' Liability Act, namely, Sections 51 et seq., Title 45. U.S.C.A. to recover damages for these injuries, and no question has been raised concerning the application of this statute to the case."

The plaintiff in his Third Amended Original Petition (Tr. 1, Page 1) made the allegations usual in FELA cases as to plaintiff's employment and his being engaged in interstate commerce, and followed with an allegation that the General Manager on whose car the plaintiff worked, used the car as a medium "to consult with various others of defendants' officers and *agents* such as division superintendents, train masters, road masters and local *agents*, with regard to various phases of the defendants' business". (Tr. 2, Page 2) (Emphasis ours). That "the duties of the plaintiff as a cook for the General Manager were to provide for the comfort, convenience and welfare of the said General Manager, his secretary and such *other agents* of the defendants as might travel with or visit or confer with the said General Manager while he was on and traveling over the defendants' lines in the performance of his

duties." (Tr. Page 3). The language of Section 51 of the FELA (45 U.S.C.) provides for recovery of damages for "injury or death resulting in whole or in part from the negligence of any of the *officers, agents, or employees of such carrier,* or by reason of any defect or insufficiency, due to *its* negligence, in *its* cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." Section 53 of the FELA (45 U.S.C.) provides that contributory negligence is not a defense, as at common law, and applies the doctrine of real comparative negligence. Despite the language of the FELA showing that it deals only with the relations between employers and employees, as recognized in the dissenting opinion filed in this Court, the majority opinion goes far afield from the terms and the meaning of the Federal Employers' Liability Act and undertakes to predicate possible liability upon the common law doctrine of respondeat superior and the enlargements of that rule by certain courts. Without undertaking to debate the common law rule and its possible application where the FELA is not the basis of the cause of action, with its limitation as to contributory negligence and the like, we call attention to the fact that court decisions apply the common law *only under the recognized law of the State,* to FELA cases, as for instance in the case of *Miller v. Terminal Railroad Association of St. Louis,* 163 S.W. 2d 1034, Supreme Court of Missouri, certiorari denied.

The majority opinion of the Court cites in footnote 3, page 4, three Texas cases as supporting its conclusion that the Missouri Pacific Railroad Company would have been liable for the acts of Houston Belt & Terminal under the common law doctrine. Not a single one of those cases

deals with any operational functions performed by an independent corporation, such as Houston Belt & Terminal. In fact all of them deal only with the question of whether the employee was working for several railroads involved in each case, instead of merely for the railroad on whose payroll he was carried. Furthermore, in the only Supreme Court decision cited, *GC&SF v. Shelton*, 96 Texas 301, it was expressly stated by the Court that *"there was no evidence of the terms of the contract* between the two railroads *concerning their joint business* at that station". (Emphasis ours.)

> "Under this state of facts the men of the switching crew were equally the servants of both companies, and the plaintiff in error was liable for their acts to the same extent as if they had been employed by it." *GC&SF Railway v. Dorsey*, 66 Texas 148, 18 S.W. 444.

In the *Dorsey* case cited as authority for the decision in the *Shelton* case, supra, it was also stated by the Court:

> "Neither of the defendants, each possessing peculiar facilities for making such proof offered *any evidence of the contract* between the three companies respecting the common yard. Their duties could only be inferred from the use of the premises. About this use there was no conflict in the evidence. The track on which the plaintiff was injured under the arrangement between the companies as evidenced by the use made of it, was as much controlled and owned by appellant as by the other defendant to which it originally belonged." (Emphasis ours.)

In the cited case of *GC&SF v. Shearer*, 21 S.W. 133, the Court of Civil Appeals (no writ of error shown to

have been sought in the Supreme Court) merely dealt with whether the fact that construction work was being done by an independent contractor, entitled the railroad to recover over against the contractor.

In the cited case of *Ft. W. & D. C. Railroad Company v. Smith,* 87 S.W. 371 (writ denied), the Texas Court of Civil Appeals merely held that it was the duty of appellant railroad to furnish appellee a safe place to work "and it cannot escape from the consequences of negligence on the part of one to whom it has given the right to use its yards and tracks."

Certainly no "dominant rule of local law" can be presumed to exist in Texas, contrary to the judgment of the Court of Civil Appeals and the judgment of the Supreme Court of Texas, denying the application for writ of error.

WHEREFORE, Respondent prays that this its Motion for Rehearing be granted, and that the Judgment heretofore entered herein be set aside, and that the judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District be affirmed.

Respectfully submitted,

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THE STATE OF TEXAS)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, this day personally appeared ROY L. ARTERBURY, whose name is subscribed to the foregoing Motion for Rehearing, to me well known, and who, after being by me duly sworn, did depose and say:

"I hearby certify that the above and foregoing Motion for Rehearing is presented in good faith and not for delay."

ROY L. ARTERBURY

SWORN AND SUBSCRIBED BEFORE ME, this _____ day of May, A. D. 1958.

Notary Public in and for
Harris County, Texas

Certificate of Service

I HEREBY CERTIFY that I delivered a copy of the above and foregoing Motion for Rehearing to Mr. C. O. Ryan, attorney for plaintiff, by delivering same to a Clerk in his office, 666 Gulf Building, Houston, Texas, this the _____ day of May, A. D. 1958. In accordance with subparagraph (b) of paragraph three, Rule 33.

ROY L. ARTERBURY